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JAMES H. McKENNEY,
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Br. of Birney for D. C. Comm

Filed Mar. 10, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 245.

WILLIAM C. BROWNING ET AL.

vs.

CHAS. H. DE FORD.

Motion to Dismiss the Writ of Error and the Appeal, and Brief for Defendant in Error on the Motion.

ARTHUR A. BIRNEY,
Attorney for Defendant in Error.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

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No. 245.

WILLIAM C. BROWNING ET AL., PLAINTIFFS IN ERROR, AND APPELLANTS,

vs.

CHARLES H. DE FORD.

Comes now the said Charles H. De Ford, defendant in error, and moves the court to dismiss the writ of error and the appeal herein, for that it appears from the record that no exceptions were saved by the plaintiffs in error to the order of the trial court overruling their motion for new trial before the tender of the case made, and all assignments of error are based on exceptions supposed to have been committed in such order.

ARTHUR A. BIRNEY,
Attorney for Defendant in Error and Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 245.

WILLIAM C. BROWNING ET AL.

vs.

CHAS. H. DE FORD.

Brief for Defendant in Error on Motion to Dismiss the Writ of Error and the Appeal.

This motion is based upon the failure of the plaintiffs in error to except to the judgment overruling their motion for new trial. The record shows only an exception by this defendant (Rec., p. 402).

There have been three codes of practice in Oklahoma; namely, the Nebraska, the Indiana and the Kansas. The Kansas Code (superseding the Indiana Code), went into effect August 14, 1893 (see Certif. of Sec. of Ok. Ter., Stat. of 1893), but by virtue of a provision of the statutes (Sec. 4633, p. 888, Stat. of 1893), the proceedings in this, as in other cases then pending, were governed to the time of judg-

ment by the Indiana Code. The judgment was rendered December 29, 1895. All proceedings from that time are governed by the Kansas Code.

Upon the record the plaintiffs in error have an exception to the judgment (Rec., p. 402), but have no exception to the overruling of the motion for new trial.

That under the Kansas Code exceptions taken during a trial cannot be considered in the appellate court unless the same be brought to the attention of the trial court by motion for new trial, followed by an exception to the refusal to grant a new trial, seems to be settled.

Decker *vs.* House, 30 Kansas, 616.
Hostetter *vs.* Hoke, 17 Kansas, 82.

The Kansas Code having been adopted in Oklahoma, the decisions of the Supreme Court of Kansas construing its provisions have the same force and effect as if made by the Supreme Court of Oklahoma.

The decisions of the territorial Supreme Court follow the doctrines of the Kansas court in the cases above cited.

Carson *vs.* Butt, 4 Okla. 133.
Jones *vs.* Territory, Ib. 45.
Rogers *vs.* Bennett, Ib. 90.
Richardson *vs.* McKay, Ib. 328.
Long *vs.* Commissioners, 5 Okla. 128.
Severy *vs.* Railroad Co. 6 Ib. 153.
Ryland *vs.* Coyle, 7 Ib. 226.
Masters *vs.* Winfield, Ib. 487.

It is to be borne in mind that the cause is not before the court on bill of exceptions, but upon a case made, framed after the trial (Rec., p. 403).

It will be urged that the statement in the record of the order overruling the motion for new trial, that the defendants excepted (Rec., p. 402) is a clerical error, and that "defendants" should be read *plaintiffs*. We answer that there

is nothing to support this claim of mistake, and that the court must therefore accept the record as it finds it. The case-made can not be changed in any particular after it is signed and filed. It is to be taken as it reads.

Furman *vs.* Grand Lodge, etc. 6 Okla. 649.
Ryland *vs.* Coyle, 7 Okla. 226.
Mulanney *vs.* Humes, 27 Pacific Rep. 817.
Gamble *vs.* Hodges, 17 Kans. 24.

The plaintiffs in error are therefore without an exception to anything which occurred at the trial. They have an exception to the final judgment, but this judgment was wholly apart from the order overruling the motion for new trial, and no assignment of error has been made attacking it.

There is, therefore, nothing properly before the court on the writ of error. The assignments of error do not challenge the pleadings or the judgment, and therefore there is nothing to be considered under the appeal. Both appeal and writ of error should be dismissed.

ARTHUR A. BIRNEY,
Attorney for Defendant in Error.

No. 245.
Brf. of Birney for D. C.

FILED
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WILLIAM C. BROWNING ET AL., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES H. DE FORD ET AL.

Brief for Defendant in Error and Appellee.

A. A. BIRNEY,
Attorney for Deft. in Error and Appellee.

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WILLIAM C. BROWNING ET AL., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES H. DE FORD ET AL.

Brief for Defendant in Error and Appellee.

STATEMENT OF THE CASE.

The plaintiffs in error were plaintiffs in the trial court, the District Court of Logan County, Oklahoma. They are the mercantile firms of Henry W. King & Co. of Chicago, and Tootle, Wheeler & Motter of St. Joseph (Mo.), the Central National Bank of Topeka (Kans.), the Bank of Topeka, and A. H. Vance. They brought their several suits in April, 1891, against the defendant Charles H. De Ford (who was sheriff of Oklahoma County), Leander T. Shockey (sheriff of Logan County), and a number of mercantile firms, non-resident of Oklahoma, charging the conversion by them of two stocks of merchandise situate at Oklahoma City and Guthrie, respectively. By stipulation (Rec., p. 15), the several actions were consolidated into two—one of which was to be against De Ford and the mercantile houses alluded to, for conversion of the Oklahoma City goods; the other against Shockey and the same merchants, for conversion of the Guthrie goods.

"The supplemental consolidated complaint," filed October 13, 1893, against Sheriff De Ford, joins with him as defend-

ants Sweet, Dempster & Co. of Chicago, A. Frankenthal & Bro. of St. Louis (Mo.), John V. Farwell & Co. of Chicago, M. D. Wells & Co. of Chicago, Rice, Stix & Co. of St. Louis, E. S. Jaffrey & Co. of New York, Burnham, Hanna, Munger & Co. of Kansas City, and Moses Byrne.

Plaintiffs claim as mortgagees in possession, under a mortgage made December 15, 1890, by W. F. Wolfe & Son, of Oklahoma City and Guthrie, and charge that the defendants, on December 5, 1890, forcibly took the goods from them, and converted them to their own use (Rec., p. 20).

The answer of the sheriff, De Ford, justifies under two writs of attachments issued against W. F. Wolfe & Son, one of which was at the suit of M. D. Wells & Co., for $2,500.21, and the other at the suit of Burnham, Hanna, Munger & Co., for $3,500 (Rec., pp. 31, 34).

The answer further charges that the mortgage under which plaintiffs claim is void as a fraudulent device made to cheat, hinder and delay the creditors of W. F. Wolfe & Son in the collection of their just demands.

The Facts as Proven.

At the time the two attachments in question here were sued out, the defendants, E. S. Jaffray & Co. brought their suit in attachment against W. F. Wolfe & Son, and attached these same goods. The defense was based on the mortgage here set up, and the issues of law and of fact were in all respects similar to the issues here. The attachment was sustained on the ground that the evidence proved the mortgage fraudulent, the case being heard on demurrer to the evidence. The review of the evidence by the Supreme Court of Oklahoma (4 Oklahoma, 303) is a very clear statement of what appears in this case.

In substance the evidence establishes facts as follows:

W. F. Wolfe & Son conducted a general mercantile business at Topeka, Kansas, from 1879 to the early part of June, 1890, at which time they removed from Topeka and

opened stores at Guthrie and Oklahoma City, to which they removed part or all of their Topeka goods. The firm consisted of William F. Wolf and his son Louis H. Another son, Frederick W., had also been a partner.

At the time of removal the firm claimed to be indebted to the plaintiffs as follows:

To Henry W. King & Co., $1,308.54 on notes maturing July 15 and August 15, 1890, and originating in a debt created in 1889 (Rec. p. 57).

To Tootle, Hosea & Co. $6,600, on three notes to mature respectively, November 1, 1890, December 1, 1890, and January 1, 1890 (Rec. p. 56).

To the Bank of Topeka $9,100, on four notes which originated in 1887 (Rec. p. 40), and were renewed every three months afterward.

To the Central National Bank of Topeka $2,000, on two notes for $1,000 each, which originated in 1889, and were renewed every three months.

The plaintiff A. H. Vance who had married a daughter of the elder Wolfe, held three notes for $1,900, for money alleged to have been loaned in 1888 and 1889 (Rec., p. 67).

Upon all the notes, except two of the last three above mentioned, A. H. Vance was a joint maker for accommodation.

As a part of their plan to obtain credit and pay the above demands out of the goods of others, William F. and Louis H. Wolfe disposed of all their real estate as follows:

July 5, 1887, Louis H. Wolfe conveyed to his wife in consideration of love and affection, his Lot 15 on Greenwood avenue, Topeka (Rec. p. 211).

May 17, 1890, William F. and Louis H. Wolfe assigned to the wife of the first named, certificates for their townsite lots in Oklahoma City, being the site of their business house in that place (Rec., pp. 203, 207).

Mrs. Wolfe claims to have put $11,000 into the firm at some indefinite time in the past, but admits this was money received from her husband (Rec., p. 205).

July 26, 1890, William F. Wolfe and wife conveyed to their daughter, Laura V., wife of the plaintiff, A. H. Vance, Lot 20 Greenwood avenue, Topeka, by deed in fee with covenants of general warranty (Rec., p. 212). This conveyance was without present consideration, and without any consideration except the $1,900 claimed to be due A. H. Vance, who now claims the conveyance was by way of security for the debt (Rec., p. 73).

The consideration named in this conveyance is $6,500; the real value *as testified by Vance himself* was $9,000 and it had been estimated as worth more (Rec., p. 216). It was subject to a mortgage for $4,500.

None of the deeds above mentioned were recorded until December 17, 1890, two days after Vance took the mortgage under which he and his co-plaintiffs claim.

Immediately on their removal to Guthrie and Oklahoma City in early June, 1890, W. F. Wolfe & Son commenced to buy goods on credit, and to secure such credit, made statements of their affairs so clearly false that no excuse for them can be attempted.

From the defendants Burnham, Hanna, Munger & Co., they obtained goods to the amount of $5,888.16, on the faith of a false statement, dated June 7, 1890, showing assets over liabilities of $53,500 (Rec., p. 258). On December 15, 1890, this debt was $4,799.07 (Rec., p. 253).

From John G. Miller & Co. they obtained goods to the amount of $2,445.50 upon a false statement dated August 22, 1890, showing net assets of $61,000, including the real estate in Topeka and Oklahoma City, conveyed by the unrecorded deeds above recited (Rec., p. 268).

John G. Miller & Co., before giving the credit, inquired of the plaintiff, the Bank of Topeka, the standing of Wolfe & Son, and received, July 28, an evasive answer (Rec., p. 278).

To Rice, Stix & Co. they made statements May 7, May 12 and July 29, the last showing net assets $62,000 (Rec.,

p. 280–281, 282), tried to get $2,000 credit, and did get $754 of goods.

From E. S. Jaffray & Co. they obtained $5,250 of goods on a false statement dated July 29, in which the secretly conveyed real estate is stated at $32,000, and net assets at $57,000 (Rec., p. 285).

From J. V. Farwell & Co. they obtained goods on the faith of a statement made February 10, declaring themselves worth from $75,000 to $100,000. (Rec., p. 292.)

From defendants A. Frankenthal & Bro. they obtained $195.85 of goods in August, on a false statement of March 29, 1890 (Rec., p. 297), and from Sweet, Dempster & Co. they also obtained goods for which on December 15, 1890, they owed $1,374.26 (Rec., p. 295).

From M. D. Wells & Co., defendants, they obtained $2,489.31 on a false statement made July 28, 1890, stating net assets at $57,000, and including the real estate (Rec., p. 249).

Of these accounts they owed on December 15, 1890, more than $17,600.

On that day the plaintiff Vance, who is an attorney at law and lived at Topeka, went to Oklahoma at the request of W. F. Wolfe (Rec., p. 354), where on the same day he drew up the chattel mortgage under which the plaintiffs claim title (Rec., p. 79). The effect of this deed was to turn over to Vance and his present co-plaintiffs, for the satisfaction of their demands, the goods purchased from the merchants who had sold to Wolfe & Son since May, 1890. This mortgage was drawn by Vance, who had general authority from all the plaintiffs to represent them in the Wolfe matter (Rec., pp. 221, 224), and included as an obligation secured by it, *the satisfied debt of Vance.* Vance at once took possession of the goods and made preparation for their sale. He then returned to Topeka, where he caused the deeds of real estate to be recorded on December 17 (Rec., pp. 212, 213). The defendant merchants promptly sued W. F. Wolfe &

Son, and, ignoring the chattel mortgage as fraudulent, attached all the goods covered by it (Rec., pp. 139, 141), and they were sold by the sheriff for $3,700.00 (Rec., p. 145). Plaintiffs sued as for a wrongful seizure of their property, and the sheriff justified under the writs of attachment and averred that the mortgage was fraudulent and void.

Upon this issue the verdict was for the defendant, and a motion for new trial was overruled, and the judgment was afterward affirmed by the Supreme Court of Oklahoma.

The record does not show that the plaintiffs excepted to the overruling of the motion for new trial. This forms the basis of defendant's motion to dismiss which is submitted herewith.

The Assignments of Error (413).

The plaintiffs in error make twenty assignments of error, but, as the case was presented in the Supreme Court of Oklahoma, the only real questions are whether the cause was tried upon correct legal principles, and whether the trial court was right in permitting proofs to be made of the frauds practiced by W. F. Wolfe & Son in creating their debts to the attaching creditors, and in suffering the jury to consider this evidence in determining the issues.

The opinion of the Supreme Court of Oklahoma presents a complete answer to the contention of plaintiffs in error in this behalf, and leaves little to be said.

The claim of the defendant is, and was at the trial, that the mortgage was void, not simply because the goods were fraudulently obtained by Wolf & Son, because the conveyance was made with the intent and purpose of defrauding their creditors, and that in this purpose the plaintiffs participated. To establish this fraudulent purpose and participation proof was given of a chain of facts leading to one result, and from them to the jury, were told to consider if fraudulent purpose *in all or any of the plaintiffs* was established. The theory of plaintiffs' attorneys is that only the

circumstances attending the making of the mortgage on December 15 may be considered. The theory of defendant is that the wicked and fraudulent scheme originated before Wolfe & Son went to Guthrie, and the doings on December 15 were only the final acts in the conspiracy. It was on this latter theory that the evidence objected to in the second assignment of error (Rec., p. 412) was admitted. No question of waiver was involved; the false statements tended to prove the *fraudulent character of the mortgage;* that they also proved the purchases fraudulent did not make them inadmissible.

> "All papers executed in pursuance of an original design, contemplated and determined upon in the beginning, are in law deemed to constitute one transaction, and are construed together, whether made on the same day or on different days; . . . whether the instruments constitute one transaction is a question for the jury."
>
> Bump on Fraud. Conveyances, Sec. 339.

If the act or declaration is so connected with the main fact under consideration as *to explain its character, further its object, or to form in conjunction with it one continuous transaction*, the evidence is admissible, without regard to the time when the act was done or the declaration was made.

> Bump. on Fr. Con. 590, 594, 595.
>
> Cooke *vs.* Cooke, 43 Md. 522.

The Instructions.

The consistent effort of the trial court to restrict the jury to the single question, whether the mortgage was fraudulent, is shown by the entire charge, but especially by the 4th, 6th, 7th, 8th, 9th and 10th paragraphs (Rec., pp. 384, 385), which certainly imposed on the defendant as great a burden as the law required him to carry.

The verdict then established as to each plaintiff that he

> "with the intent to defraud the attaching creditors did some act to defraud such creditors, or aided and

> abetted Wolfe & Son to so defraud, or had actual knowledge that the goods described in the mortgage had been by Wolfe & Son fraudulently obtained."

It would seem a shockingly immoral proposition to claim that from such a verdict, based on legally sufficient evidence, the plaintiffs should be relieved.

An antecedent creditor who knows that his debtor procured goods by fraudulent means, cannot by a chattel mortgage secure a lien upon such goods adverse to the innocent vendor thereof.

> Stern *vs.* Gage, 79 N. Y. 102.
> Wafer *vs.* Harvey Co. Bank, 26 Pac. R. 1032.

Of the three things which must concur to protect the title of the purchaser, the first is: He must buy without notice of the bad intent on the part of the vendor.

> 14 Am. & Eng. Encyc. Law (2d Ed.), 287.

The decisions of this court are conclusive upon this point. In Blennerhassett *vs.* Sherman, 105 U. S. 100, the court said (p. 117):

> "It is not enough, in order to support a settlement against creditors that it be made for a valuable consideration. It must be also *bona fide*. If it be made with intent to hinder, delay or defraud them, it is void as against them, although there may be in the strictest sense a valuable, or even an adequate, consideration."

See also—

> Kempner *vs.* Churchill, 8 Wall. 362.
> Clements *vs.* Moore, 6 Wall. at 312.

It is submitted that the judgment of the Supreme Court of Oklohama should be affirmed.

A. A. BIRNEY,
Attorney for Deft. in Error and Appellee.